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## EON BANK BHD v. RAJA HALINUDDIN RAJA HALID

COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
ALIZATUL KHAIR OSMAN JCA
MOHTARUDIN BAKI JCA
B [CIVIL APPEAL NO: B-02(IM)-1354-2011]
6 APRIL 2012

***CIVIL PROCEDURE:*** *Striking out – Application for – Whether trial judge considered relevant matters – Whether there was waiver by defendant in conduct of*
C *proceeding which negated striking out – Whether failure to assert objection to subsequent proceedings amounted to waiver*

The appellant ('the plaintiff') commenced a writ of action against the respondent ('the defendant') for default in the repayment of loan facilities granted to the defendant. The loan was granted to the defendant to finance
D the purchase of stocks/shares and the shares were placed with the plaintiff as security for the loan. The defendant filed a statement of defence admitting to the loan. The defendant subsequently applied, by summons in chambers, for the further and better particulars of the statement of claim. The application was allowed and in compliance with the order allowing the
E application ('Order of 2 December 2008'), the plaintiff supplied further and better particulars together with the reports showing the sale transaction of the shares. About eight months later, the plaintiff applied for an amendment of the writ and the statement of claim which was allowed without any objection. Thereafter, the amended writ and statement of claim were served on the
F defendant. Although the defendant took more than four months to file the amended defence, the plaintiff did not object to the late service and proceeded to file the O. 14 application, more than 18 months after the delivery of the further and better particulars to the defendant and after the defendant had filed the amended defence and counterclaim. The defendant
G did not file any affidavit in reply to the O. 14 application. However, the defendant served the application for striking out the amended writ and statement of claim on the basis that there was failure to comply with Order of 2 December 2008 which was a peremptory order. The High Court allowed the defendant's application for striking out the plaintiff's action and hence,
H this appeal.

**Held (allowing appeal with no order as to costs)**
**Per Mohtarudin Baki JCA delivering the judgment of the court:**

**(1)** The trial judge did not consider the relevant matters and facts before granting the striking out order. Based on the recent approach taken in the
I case laws, had the trial judge considered the principles of law relevant to the case, it would not result in the striking out of the High Court action. (paras 15-17)

**(2)** There was clearly a waiver on the part of the defendant in the conduct of the proceedings. The defendant knew that the further and better particulars were served late and yet it proceeded as if the action would be heard and disposed of on merits, on the basis that the proceedings were still valid for disposal. The defendant also did not take steps to assert an objection to the subsequent proceedings that followed after the late service of the further and better particulars but instead took steps to defend the case on the merits despite knowledge of the irregularity, which was held to be a waiver. (para 18)

**(3)** The object of requiring the further and better particulars on the part of the defendant had been achieved, though the particulars were given late and it had also given the defendant the advantage of putting up the set off and the counterclaim through the amended defence that was filed subsequently. (para 21)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu ('plaintif') telah memulakan satu tindakan writ terhadap responden ('defendan') bagi kegagalan pembayaran semula kemudahan pinjaman yang diberikan kepada defendan. Pinjaman tersebut diberikan kepada defendan untuk membiayai pembelian saham dan saham-saham tersebut dicagarkan kepada plaintif sebagai jaminan bagi pinjaman tersebut. Defendan memfailkan penyataan pembelaan mengakui pinjaman tersebut. Defendan kemudiannya, melalui saman dalam kamar, memohon butir-butir lanjut dan jelas penyataan tuntutan tersebut. Permohonan tersebut dibenarkan dan dalam mematuhi perintah membenarkan permohonan tersebut ('Perintah 2 Disember 2008'), plaintif mengemukakan butir-butir lanjut dan jelas bersama-sama dengan laporan yang menunjukkan transaksi jualan saham-saham tersebut. Kira-kira lapan bulan kemudian, plaintif memohon untuk meminda writ dan penyataan tuntutan yang dibenarkan tanpa sebarang bantahan. Selepas itu, writ dan penyataan tuntutan terpinda diserahkan kepada defendan. Walaupun defendan mengambil masa lebih dari empat bulan untuk memfailkan penyataan pembelaan terpinda, plaintif tidak membantah penyerahan lewat tersebut dan meneruskan untuk memfailkan permohonan A. 14, lebih dari 18 bulan selepas penyerahan butir-butir lanjut dan jelas kepada defendan dan selepas defendan memfailkan penyataan pembelaan terpinda dan tuntutan balas. Defendan tidak memfailkan apa-apa afidavit balasan kepada permohonan A. 14 tersebut. Walau bagaimanpun, defendan menyerahkan permohonan untuk membatalkan writ dan penyataan tuntutan terpinda atas dasar bahawa terdapat kegagalan mematuhi Perintah 2 Disember 2008 yang merupakan perintah muktamad. Mahkamah Tinggi membenarkan permohonan defendan untuk pembatalan tindakan plaintif dan dengan itu, rayuan ini.

**Diputuskan (membenarkan rayuan tanpa perintah untuk kos)**
**Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim bicara tidak mempertimbangkan perkara-perkara relevan dan fakta-fakta sebelum memberikan perintah pembatalan. Berdasarkan pendekatan terkini dalam kes-kes perundangan, jika hakim bicara mempertimbangkan prinsip undang-undang yang relevan dengan kes, ia tidak akan membawa kepada pembatalan tindakan Mahkamah Tinggi.

**(2)** Jelas terdapat pengenepian oleh defendan dalam prosiding tersebut. Defendan mengetahui bahawa butir-butir lanjut dan jelas telah diserahkan lewat dan masih meneruskan seolah-olah tindakan tersebut akan dibicarakan dan diputuskan berdasarkan merit, atas dasar bahawa prosiding tersebut masih sah untuk diputuskan. Defendan juga tidak mengambil sebarang langkah untuk membangkitkan bantahan terhadap prosiding terkemudian berikutan penyerahan lewat butir-butir lanjut dan jelas tetapi sebaliknya mengambil langkah membela kes tersebut atas merit walaupun mengetahui tentang ketidakaturan, yang diputuskan sebagai pengenepian.

**(3)** Tujuan meminta butir-butir lanjut dan jelas pada pihak defendan telah tercapai, walaupun butir-butir tersebut diberikan lambat dan ia juga telah memberikan defendan kelebihan untuk mengemukakan *set off* dan tuntutan balas melalui pembelaan terpinda yang difailkan kemudiannya.

**Case(s) referred to:**
*Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 FC* ***(refd)***
*Fry v. Moore (1889) 23 QBD 395* ***(refd)***
*Grand Metropolitan Nominee (No 2) Co Ltd v. Evans [1993] 1 All ER 642* ***(refd)***
*Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor [2010] 3 CLJ 550 CA* ***(refd)***
*Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666* ***(refd)***
*Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC* ***(refd)***
*Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA* ***(refd)***
*Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd v. ASM Development Sdn Bhd [2003] 4 CLJ 213 FC* ***(refd)***
*Re Jokai Tea Holdings Ltd [1993] 1 All ER 630* ***(refd)***
*Reiss v. Woolf [1952] 2 All ER 3* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 14

*For the appellant - Amarjeet Singh (WK Yee with him); M/s Wan Chin & Co*
*For the respondent - Wan Muhammad Wan Yahya (Nurliyana Ramlan with him); M/s Wan M Amin & Assocs*

*[Appeal from High Court, Shah Alam; Suit No: 22-460-2007 (MT3)]*

*Reported by S Barathi*

## JUDGMENT

**Mohtarudin Baki JCA:**

**[1]** This is the appellant's (hereinafter referred to as the "plaintiff") appeal against the decision of 18 April 2011 given by the High Court which allowed the respondent's (hereinafter referred to as the "defendant") application to strike out the plaintiff's amended writ and amended statement of claim dated 6 January 2010 in an action against the respondent for default of repayment of the loan facilities. The appellant being dissatisfied with the decision of 18 April 2011 has filed the notice of appeal dated 9 May 2011 to this court which is the present appeal.

**[2]** We heard the appeal on 20 October 2011. After hearing the submissions of learned counsel for the parties, we allowed the appeal.

**[3]** Accordingly, we ordered that the decision of the High Court dated 18 April 2011 which allowed the defendant's application to set aside the plaintiff's writ and statement of claim to be set aside. We are of the view that the case should go for full trial and ordered the case to be reinstated and set down for case management in the High Court. No order as to costs was made and the deposit paid for the present appeal was ordered to be refunded to the appellant.

**[4]** Briefly, the plaintiff filed the action in the High Court by a writ action dated 22 March 2007 claiming the sum of RM420,808.93, being the loan sum that was due and payable as at 29 January 2007 (with interest thereon and costs) which the defendant defaulted to pay under the loan facilities granted to him. The loan was granted to the defendant to finance the purchase of stocks/shares and the shares were placed with the plaintiff as security for the said loan.

**[5]** The defendant filed the statement of defence dated 12 June 2007 admitting to the loan. The loan is evidenced by the offer letter dated 12 March 2002 with the placement of the shares documents for the security so given. The defendant alleged that there was no monitoring by the plaintiff regarding the change of the value of the shares and that the plaintiff should have forced sold and/or taken such steps to avoid any losses to the defendant. The plaintiff denied such an obligation and had properly sold the shares in realising the proceeds towards part-payment of the outstanding loan. The plaintiff has filed the reply to the defence dated 9 August 2007. Thereafter, the defendant applied, by summons in chambers dated 27 August 2007, for the further and better particulars of the statement of claim.

**[6]** On 2 December 2008, the registrar of the court allowed the said application by the defendant, which provided for the further and better particulars to be given within 14 days, failing which the action is struck off (the peremptory order). In complying with the order by the registrar, the plaintiff's solicitors supplied the further and better particulars together with

A the reports showing the sale transaction by delivering the same on 14 January 2009, resulting in about three weeks delay, though the sealed order dated 2 December 2008 was served on 23 March 2009. About eight months later ie, on 20 August 2009, the plaintiff applied for an amendment of the writ and the statement of claim. This application was allowed without any objection
B on 6 January 2010.

**[7]** On 1 February 2010, the amended writ and statement of claim were served on the defendant's solicitors. The defendant's solicitors, took more than four months to file the amended defence (which included a set off and counterclaim), which was served on 7 June 2010, to which the plaintiff
C through its solicitors did not object to the late service of the same. On 10 June 2010, the plaintiff proceeded to file the O. 14 of the Rules of the High Court 1980 application and on 21 June 2010, the sealed copy of the O. 14 application was served on the defendant's solicitors. This O. 14 application was filed by the plaintiff more that 18 months after delivery of the further
D and better particulars to the defendant and after the defendant had filed the amended defence and counterclaim.

**[8]** The defendant did not file any affidavit in reply to the plaintiff's order 14 application and the defendant, through its solicitors on 23 July 2010, (three days before the hearing fixed for the O. 14 application), served the
E defendant's application for striking out the amended writ and statement of claim on the basis of that there was failure to comply with the order dated 2 December 2008, which was a peremptory order.

**[9]** The High Court adjourned the hearing of the O. 14 application in order to hear the defendant's application for striking out, though it was filed later
F and directed for written submissions to be filed on the defendant's application for striking out and had also fixed the decision date on 18 April 2011. On the same date, the High Court allowed the defendant's application for striking out the plaintiff's action.

G **[10]** As a result of this decision, this present appeal has been filed to this Court of Appeal.

**[11]** It is submitted by the plaintiff that the learned judge had wrongly exercised her discretion in allowing the defendant's application for striking out. It is also contended that the learned judge also erred in applying the
H applicable legal principles in striking out the plaintiff's action for failure to comply with a *peremptory order*. It is further submitted by the plaintiff that the trial judge ignored the pertinent facts and matters, as set out in the chronology above, although these matters were raised in the plaintiff's affidavits in reply as well as in the plaintiff's written submissions.

I **[12]** There are two main issues raised by the plaintiff to challenge the decision made by the High Court in striking out the plaintiff's action.

**[13]** Firstly, it is submitted that the case of *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233 referred to by the trial judge is distinguishable on the facts of this case. The Federal Court in *Lim Oh & Ors* was relying on the principles of the law as expounded in *Janov v. Morris* [1981] and *Bailey v. Bailey* [1983]. However, subsequently in 1989 the English Court of Appeal had the occasion to review and reconsider the decision of *Janov v. Morris*, in the subsequent case of *Re Jokai Tea Holdings Limited* [1993] 1 All ER 630, which laid down the new criteria in the application of the law ("the new test"). The case of *Re Jokai Tea Holdings Ltd* was affirmed and applied in subsequent cases of the English Court of Appeal in *Grand Metropolitan Nominee (No 2) Co Ltd v. Evans* [1993] 1 All ER 642 and *Hytec Information System Ltd v. Coventry City Council* [1997] 1 WLR 1666.

**[14]** The Federal Court in the subsequent case of *Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd v. ASM Development Sdn Bhd* [2003] 4 CLJ 213 had distinguished the case of *Janov v. Morris* and also its earlier decision in *Lim Oh & Ors*, by considering and applying the legal principles laid in *Re Jokai Tea Holdings Ltd* by the adopting the new test. The Court of Appeal in the following cases also had the occasion to consider the cases of *Re Jokai Tea Holdings Ltd* and *Hytec Ltd* in applying the new test - *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; and *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550.

**[15]** Learned counsel for the plaintiff submitted that, based on the new test on the principles of law as set out in the aforesaid case-laws, and on the material as per the facts and matters as set out above, the trial judge had ignored the following relevant matters:

(i) the defendant did not object to the late serving of the further and better particulars, but accepted the same and proceeded with the matter on the basis that the action would proceed further until its conclusion on merits;

(ii) in fact, the defendant's said conduct is fortified by its subsequent act of consenting to the plaintiff's application to amend the writ and statement of claim;

(iii) further, the defendant also took steps to proceed with the matter by filing its amended defence (which included the set off and counterclaim) and the plaintiff also allowed indulgence of time in the filing of the amended defence by the defendant;

(iv) the defendant only decided to file the striking out application when faced with the O. 14 application as a tactical manoeuvre in avoiding the O. 14 proceedings;

(v) the plaintiff did not ignore or flout the order to provide the particulars but intended to obey the same and did obey the same by providing the further and better particulars, though it was provided out of time; and

A (vi) there has been no history of failures to comply with other orders of the court on the part of the plaintiff as the said delay in providing the particulars in question was the very first incident.

**[16]** Upon perusing all the relevant facts and submissions of the parties, we are of the view that the learned trial judge did not consider the above facts B before granting the striking out order. Thus, we find that we are in complete agreement with the submission of learned counsel for the plaintiff on these issues.

**[17]** We are also of the view that, based on the recent approach as taken in the case laws as aforesaid, the following principle of the law is relevant C to this case, which if the trial judge had considered, would not result in the striking out of the High Court action, which principle of law was adopted by the Court of Appeal in the case of *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88:

D A peremptory order (unless order) is an order of the last resort. Such an order will not meet the "ends of justice" if it results in a miscarriage of justice. The judge must look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default.

E **[18]** Secondly, we find that there was clearly a waiver on the part of the defendant in the conduct of the proceedings; 1) firstly, the defendant knew that the further and better particulars were served late and yet it proceeded as if the action would be heard and disposed of on merits on the basis that the proceedings were still valid for disposal 2) secondly, the defendant did not take steps to assert an objection to the subsequent proceedings that F followed after the late service of the further and better particulars but instead took steps to defend the case on the merits despite knowledge of the irregularity, which was held to be a waiver.

**[19]** In *Fry v. Moore* (1889) 23 QBD 395, which was approved by our Supreme Court in *Development & Commercial Bank Berhad v. Aspatra* G *Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141; [1995] 3 MLJ 472 which observed as follows:

H We are in entire agreement with the decision in *Fry v. Moore*. The second defendant had asked for leave to file an appearance and to file a statement of defence, clearly indicating that he wanted to go into the fray in full swing and that the matter of irregular service was a matter of the past; no longer an issue.

**[20]** We agree with the submission of learned counsel for the plaintiff that the case of *Pertubuhan Berita Nasional Malaysia* which had relied on the earlier I English case of *Reiss v. Woolf* [1952] 2 All ER 3 would have no application as the case of *Reiss v. Woolf* was not dealing with the question of a waiver on the part of a litigant.

**[21]** We find that the object of requiring the further and better particulars on the part of the defendant had been achieved, though the particulars were given late and it had also given the defendant the advantage of putting up the set off and the counterclaim through the amended defence that was filed subsequently.

**[22]** Upon perusing all the relevant documents and submissions by both parties in this appeal, we (unanimously) decided that:

(i) the appellant's appeal is allowed with no order as to costs;

(ii) the order of the High Court dated 18 April 2011 is set aside;

(iii) civil Suit No. 22-460-2007 (MT3) is reinstated and to be set down for case management; and

(iv) deposit refunded to the appellant.